SUPREME COURT, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-766

AMERICAN CAST IRON PIPE COMPANY,
Petitioner,

v.

RUSH PETTWAY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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In their opposing brief,[1] respondents assert that "[s]ubstantially all" of the questions presented by the petition "were decided adversely to the petitioner in the 1974 decision of the Court of Appeals, from which there was no review sought in this Court" and specify in their footnote 2 petitioner's questions 1, 2 and 4 as such questions (Opp. Br. 2 & n. 2). As to questions 1 and 2, respondents' assertion is patently false and irresponsible;[2] as to question 4, their

[1]Cited as "Opp. Br."

[2]Question 1 involves the issue of whether the Court of Appeals *in 1978* properly required the District Court on remand to enter the "interim order" abolishing petitioner's promotion and transfer system instituted by the District Court in 1975 (A.1) and substituting an alternate system—without any evidence having been adduced directed to the necessity, fairness, or workability of the alternate system and contrary to the Dis-

assertion ignores the clear conflict between the Court of Appeals' decisions rendered in 1974 and 1978 and numerous intervening decisions of this Court pertaining to business necessity (Pet. at 38-41).

Respondents rely heavily throughout their brief upon the Court of Appeals' statement in its 1974 decision that the "record discloses no proof by the company that positions in other than craft or technical lines of progression are functionally related" (Opp. Br. 3, 8; *see id.* 4, 10, 11). Respondents fail to point out, however, that the District Court found in its 1972 decision that the company's departmental seniority system then under attack was applied neutrally and did not perpetuate past discrimination (Pet. at 6, *citing* 7 FEP Cases at 1013, 1019). Thus, not until the Court of Appeals reversed the latter finding in 1974 did the company face the burden of articulating nondiscriminatory reasons for the seniority system (under this Court's three-step procedure) — or even a burden of demonstrating that the seniority system was justified by business necessity (under the now infirm standard set forth by the Court of Appeals). The functional relatedness of the jobs within the LOP's was never directly in issue until after 1974.[3] The company proved informally to the satisfaction of the District Court's findings that the abolished system is necessary for the safety and efficiency of Petitioner's plant. Furthermore, the alternate system was *never sought by the plaintiffs in the District Court* (Pet. 2-3)—a point not denied by respondents. Question 2 involves the issue of whether the promotion by an employer of its employees on the basis of their relative qualifications, without regard to race, constitutes unlawful discrimination. That issue has never been raised by the plaintiff class or respondents and the Court of Appeals' 1974 opinion contains absolutely no mention or discussion of the issue. The issue arose from the 1978 Court of Appeals' decision without any briefing, trial, or evidence in the record relevant to the same.

In sum, respondents' assertion that questions 1 and 2 were decided in the 1974 Court of Appeals' decision is demonstrably and totally false.

[3]The Court of Appeals in 1974 remanded the issue to the District Court for trial.

trict Court and counsel of record for the plaintiff class in the 1974-75 remand period that the jobs in the LOP sequences were functionally related (Pet. at 30-31); but the Court of Appeals ignored such proof and ordered the entry of relief flatly repugnant to the District Court's findings based upon that proof (Pet. at 20-21). The impression sought to be created by respondents, that no proof exists of such functional relatedness, is unfair and totally incorrect. Furthermore, the validity of the LOP-based system *itself* has never been in issue prior to the Court of Appeals' summary abolition of the same in 1978, a fact even respondents have not denied.

In response to petitioner's fourth question, respondents argue at length that the Court of Appeals properly disregarded this Court's three-step procedure (see Pet. at 38-40) en route to the Court of Appeals' summary abolition of petitioner's promotion and transfer system and substitution of its own, because: (1) such three-step procedure is applicable only to the "liability phase" of an "individual disparate treatment case" but not to the "remedies stage" of a "class disparate impact case" (Opp. Br. at 15); (2) the Court of Appeals foreclosed the issue of "liability" in its 1974 decision, leaving only the question of "remedy" to the District Court on remand (*id.* at 12, 14); and (3) the promotion and transfer system mandated by the District Court in 1975 is not "illegal" itself but merely perpetuates past discrimination (*id.* at 14). Respondents' arguments ignore that:

1. The issue of "liability" was not foreclosed by the Fifth Circuit in its 1974 decision. That Court's finding of "liability", in the sense that it required the departmental system to be enjoined, was "tempered" by the company's right to demonstrate that the departmental LOP's were justified by business necessity (A. 115), which the company amply

demonstrated to the District Court on remand. Furthermore, that Court's finding of "liability", in the sense that it held the company's neutral departmental seniority system to be unlawful because it was deemed to perpetuate pre-Act discrimination, was made on a now discredited theory.[4]

2. This Court's three-step procedure has been applied, as it logically should, to both disparate treatment cases and to disparate impact cases, regardless of whether such cases were brought as individual or class actions.[5]

3. This Court's opinions make it clear that its three-step procedure is meant to be applied in cases where District Courts and Courts of Appeal are restructuring business practices — whether such restructuring is accomplished at the liability or remedies stage of a lawsuit.[6] Title VII was never intended to allow courts to ride roughshod over neutral business practices that have evolved over many years in highly competitive markets — and certainly not until there

[4]In May of 1977, this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), rejected the concept that a bona fide, neutral seniority system is illegal merely because it perpetuates the effects of pre-Act or post-Act discrimination, implicitly overruling 14 decisions of the Fifth Circuit to the contrary. 431 U.S. at 379 n. 2 (opinion of Marshall, J., dissenting). The Court of Appeals in the decision below, while criticizing *Teamsters* (A. 123-124), recognized the controlling effect of *Teamsters* in this case and remanded the issue of whether the company's seniority system was bona fide under *Teamsters* to the District Court for trial (A. 126).

[5]*Disparate treatment cases: Furnco Construction Corp. v. Waters*, ... U.S. ....., 57 L.Ed. 2d 957, 968 (1978) (individual action); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-805 (1973) (individual action). *See Board of Trustees of Keene State College v. Sweeney*, ... U.S. ....., 47 U.S.L.W. 3330 (No. 77-1792, November 14, 1978) (individual action). *Disparate impact cases: Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (class action); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (individual action).

[6]*Furnco*, 57 L.Ed. 2d at 968; *Albemarle*, 422 U.S. at 425. *Cf., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976) ("Petitioners do not ask for modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire").

is clear proof on the record that alternative practices exist that would equally serve the employer's "legitimate interest in 'efficient and trustworthy workmanship' ". *Albemarle*, 422 U.S. at 425, *quoting McDonnell Douglas*, 411 U.S. at 804-805. Surely neutral practices should be more entitled to the protections afforded by the three-step procedure than practices deemed to be discriminatory.

4. In any event, regardless of which standard is applied by the Court of Appeals, absolutely no evidence has been adduced to show either that the District Court's promotion and transfer system instituted in 1975 is insufficient, discriminatory or unworkable, or that the Court of Appeals' substituted system is sufficient, nondiscriminatory or workable.

Respondents try to create the impression that the injunctive relief entered below was devised by petitioner unilaterally and was essentially no different from and was "even more restrictive" than the departmental seniority system ordered to be enjoined in 1974 (Opp. Br. 3, 5, 9 & n. 14). Having arrived belatedly in the post-judgment stage of this lawsuit, counsel for respondents obviously cannot appreciate the rigorous procedure in which the injunctive relief was hammered out *trilaterally* by counsel for both parties and by the District Court (Pet. 7-8),[7] nor can he appreciate the sweeping, extensive nature of the changes made by the District Court's injunctive relief (Pet. at 8-9; *see* A. 1-46; 116-118).[8]

[7]Counsel of record for the plaintiff class, Adams, Baker & Clemon, and associate counsel Jack Greenberg, et al, of the NAACP Legal Defense Fund—who have litigated this case since 1965—are far from being push-overs as respondents' counsel suggests.

[8]Respondents erroneously assert that there is far less job boxing and interconnecting in the 1975 LOP's and no appreciable change in the "altitude" of entry level jobs in the 1975 LOP's (Opp. Br. 9 n. 14). Extensive job boxing and interconnecting was accomplished by the District Court and numerous jobs which formerly were entry level jobs were

Respondents' statement that "petitioner argues that the use of plantwide seniority is unworkable at its facility" (Opp. Br. at 17) is surprising and obviously inaccurate. Plantwide seniority was awarded by the District Court in its 1975 Decree which has been in effect for more than three years and from which petitioner took no appeal. What petitioner adamantly contends to be unworkable is the promotion and transfer system summarily imposed by the Court of Appeals in lieu of the District Court's system which was summarily abolished by the Court of Appeals.

Respondents' assertion that petitioner argues for the "status quo" theory of remedies (Opp. Br. at 17) is simply absurd. The District Court's injunctive relief is the embodiment of the "rightful place" doctrine, having been *modeled after* decrees approved by the Fifth Circuit (Pet. at 21 n. 26). Indeed, under decisions of this Court, including *Teamsters*, respondents may be entitled to *less* relief than afforded by the District Court (A. 126).

Although not denying the importance of petitioner's question 3 in employment litigation or the clear conflict between the decision below and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (see Pet. at 36-38), respondents attempt to argue on the merits that the releases were not knowingly and voluntarily executed due to the asserted lack of notice under Rule 23(e) (Opp. Br. 21). Petitioner has consistently maintained that Rule 23(e) was not applicable to the instant case because petitioner did not consent to the judgments or decrees entered by the District Court, but even if Rule 23(e) is deemed applicable, then petitioner strongly maintains that: (1) all of the safeguards of 23(e) — notice of the judgment and opportunity to object — were present in the instant case; and

removed from the LOP's and designated as "pre-entry base group jobs", thereby elevating substantially the "altitude" of entry-level jobs. Even the Court of Appeals stated that the "procedures adopted by the district court improve the opportunities of class members for both intradepartmental promotion and interdepartmental transfer" (A. 128).

(2) the releasors had far more than ample knowledge of the facts necessary to a voluntary and knowing waiver.[9]

In sum, respondents' assertion that the releasors had inadequate information upon which to make a voluntary and knowing waiver is far from the truth. It is hard to imagine a case where releasors were represented, notified, and informed as thoroughly as in the instant case. Under *Gardner-Denver*, the releases should not have been invalidated summarily by the Court of Appeals without any showing by the releasors that the releases were executed involuntarily and unknowingly.

In response to the serious practical problems that would be created by the interim order, described by petitioner at length in the petition (Pet. at 21-29), respondents assert that "[e]vidence in the record already refutes most of these considerations" (Opp. Br. 9, 10 and n. 15). Respondents' assertion is outrageously inaccurate. The unprecedented relief awarded under the interim order was *never sought* by counsel of record for the plaintiff class or by respondents in the District Court. Abolition of petitioner's LOP-based promotion and transfer system likewise has never been

[9] In May, 1975, the May Decree with Appendices A, B and C was mailed in booklet form to all employees of the company accompanied by a letter approved by the District Court summarizing the provisions of the Decree. The Decree itself devoted almost five pages to the calculation of back pay (A. 12-16), notified employees of their right to object to the back pay award (A. 16) and of the release that would be required as a condition to receipt of any back pay (*id.*). Class members had ample opportunities and did object to the proposed judgment—indeed, class members (either pro se or through counsel) filed objections to almost every proposed decree. Furthermore, two hearings were held, attended by large numbers of class members, at which repeated objections to the decrees were made by respondents' counsel through testimony and argument and at the latter hearing, respondents' counsel was provided the right to put on evidence and cross examine company witnesses concerning respondents' objections to the judgments, which latter right respondents' counsel expressly failed to exercise.

The releasors were represented by able counsel, Adams, Baker &

sought — a fact not denied by respondents. No evidence has *ever* been adduced in this case relevant to the wholesale abolition of the LOP-based system or to the practical problems and conceptual infirmities of the interim order that threaten the livelihood of petitioner's business. Respondents' counsel is obviously handicapped by his arrival in this action at the post-judgment, post-trial stage in 1975 (after four appeals and 10 years of litigation). His attempts to mislead this Court are reprehensible.

Respondents do not address, discuss, attempt to resolve, or offer *any solutions whatsoever* to *even one* of the serious problems created by the interim order (Pet. at 21-29). Those problems must be deemed to be valid for purposes of this petition, and the decision below — in the interests of fairness and justice to petitioner and *all* of its employees, including respondents — should be vacated and the District Court's Decree and Judgments affirmed, or at the very least, this case should be remanded for a trial so that those problems can be considered by the District Court based on evidence adduced and consistent with the legal principles enunciated by this Court.

CONCLUSION

In light of (1) the inability of respondents to face the issues presented in the petition without grossly distorting the relevant facts and law; (2) the numerous conflicts between the decision below and relevant decisions of this Court; (3) the gravity of the injustice of the decision below to petitioner and its employees; and (4) respondents' failure to deny the importance and substantiality of the questions presented, the need for plenary review of the action below is indisputable. Petitioner respectfully suggests and prays to the Court that the petition should be granted and:

1. The Decree and Judgments of the District Court should be affirmed summarily.

2. In the alternative, the decision of the Court of Appeals should be vacated summarily to the extent it reversed the Decree and Judgments of the District Court and to the extent it invalidated the releases of claims, and the action should be remanded to the District Court for a trial on the merits of those aspects of the District Court's Decree and Judgments reversed by the Court of Appeals, consistent with the principles set forth in relevant decisions of this Court.

Respectfully submitted,

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Clemon, and associate counsel, Jack Greenberg of the NAACP Defense Fund. Class members were further represented by the "Committee for Equal Job Opportunity, [which] held *monthly meetings* and *distributed news letters* to keep the class informed of the progress of the case" (A. 99) (emphasis added).